

2004

State of Utah v. Ralph Leroy Menzies : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Utah v. Menzies*, No. 20040360.00 (Utah Supreme Court, 2004).
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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Respondent/Appellant,

vs.

RALPH LEROY MENZIES,

Petitioner/Appellee.

Case No. 20040360-SC

BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE PAT BRIAN

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Supreme Court
UTAH [REDACTED]
BRIEF

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DOCKET NO. 20040360-SC

FILED
UTAH APPELLATE COURTS
DEC 03 2004

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LIST OF PARTIES

The parties are accurately identified in the caption.

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Respondent/Appellant, vs. RALPH LEROY MENZIES, Petitioner/Appellee.	Case No. 20040360-SC
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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Utah Code Ann. § 78-2a-3(2)(a) (West 2004) grants the Utah Supreme Court jurisdiction over this appeal.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. The district court erred in ruling that the Division of Finance's administrative rule providing a retainer to cover costs of counsel and reasonable litigation expenses conflicts with the governing statute.

The interpretation of a statute is a question of law reviewed for correctness. *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997); *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201, 1203; *Taylor ex rel. C.T. v. Johnson*, 1999 UT 35, ¶ 6, 977 P.2d 479, 480.

2. It is reasonable and rational for the Division of Finance to provide, by administrative rule, procedures for the time and manner of making payments to cover costs of counsel and reasonable litigation expenses as required by the governing statute.

An agency's interpretation of the operative provisions of statutory law it is empowered to administer must be rational and is set aside only if it is imposed arbitrarily or capriciously or is beyond the tolerable limits of reason. *Associated General Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112, ¶¶ 18-19, 38 P.3d 291; *Williams v. Public Service Comm'n of Utah*, 754 P.2d 41, 50 (Utah 1988).

3. The district court erred in ordering the Division of Finance to pay for transcripts that petitioner failed to have transcribed and included as part of the record in his petition for Rule 60(b) relief, and for transcripts that are irrelevant to claims he wishes to pursue on appeal.

The interpretation of statutes and rules is a question of law reviewed for correctness. *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997); *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201, 1203; *Taylor ex rel. C.T. v. Johnson*, 1999 UT 35, ¶ 6, 977 P.2d 479, 480.

DETERMINATIVE STATUTES

The full text of the following determinative statute and administrative rule pertinent to the issues before the Court is attached as Addendum A:

Utah Code Ann. § 78-35a-202 (West 2004)

Utah Administrative Code R. 25-14-1 to 6 (2002)

STATEMENT OF THE CASE

This appeal stems from a May 10, 2004, district court ruling that portion of an administrative rule promulgated by the Division of Finance (the “Division”) is inconsistent with the governing statute. (R. 3904-3909). Although Menzies’s (“petitioner”) case has a long history, most of its proceedings are irrelevant to this appeal. In short, on March 8, 1988, a jury convicted petitioner of capital murder and kidnapping in the death of Maurine Hunsaker. *See generally State v. Menzies*, 889 P.2d 393, 396 (Utah 1994) *cert denied*, 513 U.S. 1115 (1995). Judge Raymond Uno sentenced petitioner to death. *Id.* After the Utah Supreme Court affirmed petitioner’s conviction, he filed a Petition for Writ of Habeas Corpus and/or Post Conviction Relief. (R. 1-37). Ultimately, the district court granted the State’s motion for summary judgment, dismissed petitioner’s petition, and denied his subsequent motion for reconsideration. (R. 2237-63; 2399-2400). Petitioner has appealed the dismissal of his petition. (R. 3913-14)

On February 9, 2004, petitioner moved the trial court to order the “State of Utah” to pay for a the deposition transcript of Edward Brass, petitioner’s prior legal counsel. (R. 3659-60). Later, petitioner moved to appoint Rule 8 qualified counsel for his appeal and to require the “Government” to pay for transcripts, printing, and costs for appeal. (R. 3790-91).

Judge Pat Brian granted petitioner’s motions to pay for the Ed Brass deposition transcript, to appoint Rule 8 qualified counsel for appeal, and to require the “Government” to pay for transcripts, printing, and costs for appeal. (R. 3904-09). The

court ruled that the Division's administrative rule providing payment of a retainer to cover both costs of counsel and litigation expenses is inconsistent with the governing statute. (R. 3908-09.) Judge Brian signed a final order consistent with his memorandum decision on May 10, 2004. (R. 3927-29).

The Division filed a notice of appeal on April 26, 2004. (R. 3919-21). Petitioner filed a notice of cross-appeal, and requested preparation of over 30 transcripts and "designation of records." (R. 3917-18; 3924-26). The Division responded and objected to petitioner's transcript request. (R. 3935-40). The Division argued that most of the requested transcripts were irrelevant to this appeal and were excessive given the issue on appeal. (R. 3935-40). Petitioner moved to strike the Division's Response and Objection. (R. 3941-42).

Prior to ruling on petitioner's motion to strike, the Utah Supreme Court considered and ruled upon the State's motion to strike petitioner's designation of record in the related post-conviction appeal (Case No. 20040289-SC). (Addendum "B"). The Supreme Court denied the State's motion in part and granted it in part and ruled that "[t]he State shall be required to provide a transcript for each hearing described by affidavit to be submitted by [petitioner's] counsel to the district court." *Id.* The affidavit was required to specify the manner in which each hearing was referenced during the Rule 60(b) proceedings and its relevance to those proceedings. *Id.* Based on this ruling, Judge Brian, in this case, ordered petitioner's counsel to file an affidavit as detailed and ordered by the Utah

Supreme Court, and to file an amended request for transcripts and designation of record. (R. 3995-98). Although petitioner did file the affidavit as ordered by the Supreme Court in the post-conviction case, she has not filed an affidavit nor amended request for transcripts and designation of record in this case.

STATEMENT OF RELEVANT FACTS

Utah Code Ann. § 78-35a-202 (West 2004) (the “statute”) provides that in post-conviction appeals of death penalty cases the “[c]osts of counsel and other reasonable litigation expenses incurred . . . shall be paid from state funds by the Division according to rules established” pursuant to the Utah Rulemaking Act. Accordingly, the rule promulgated by the Division provides that all legal counsel agree to accept for “legal services performed and litigation costs incurred the amounts provided in the Schedule of Payments of Attorneys Fees” Utah Admin Code R. 25-14-3 (2002) (the “administrative rule” or “rule”). The Schedule of Payments of Attorneys Fees provides payment of set amounts upon the happening of certain events, such as appointment of counsel by a district court, and timely filing of a petition for post-conviction relief. Utah Admin. Code R. 24-14-4 (2002). In addition, the rule provides separate and additional payment for “reasonable litigation expenses not to exceed a total of \$20,000.00 in any one case for court approved investigators, expert witnesses, and consultants.” Utah Admin. Code R. 25-14-3 (2002).

Shortly after the district court dismissed the petition for post-conviction relief and denied petitioner’s motion for reconsideration, petitioner filed a Motion to Require

Government to Pay for Transcripts, Printing, and Cost for Appeal and a Motion to Appoint Rule 8 Qualified Counsel for Appeal. (R. 3990-91). Even though the Division had paid petitioner all the required amounts for “the legal services performed and litigation costs incurred,” petitioner argued that he was entitled to additional and separate payment of ordinary, routine legal costs under the rule’s \$20,000 allotment for investigators, expert witnesses, and consultants. (R. 3792-3799).

The Division filed a memorandum opposing petitioner’s motions. (R. 3830-35). The Division argued that according to the plain language of the rule and its harmony with the statute, petitioner agreed to accept the payments already made as full compensation for both the costs of counsel and reasonable litigation expenses. (R. 3830-35). Since petitioner did not request payment for expenses of court approved investigators, expert witnesses, or consultants, the Division argued, he was not entitled to any additional payment. (R. 3830-35).

Nevertheless, Judge Brian granted petitioner’s motions and ordered the Division to pay for all transcripts, printing, and costs that the petitioner deems necessary to perform the post conviction appeal separately from, and in addition to, the legal fees and other payments the Division already made to petitioner. (R. 3904-09). Judge Brian concluded that the “rule fails to separate ‘costs of counsel’ from ‘other reasonable litigation expenses,’” and, therefore, the rule “is too narrowly written to represent the statute.” (R. 3908). Judge Brian also concluded that the Division was required to pay for any

transcript petitioner deemed necessary for his appeal. (R. 3909).

SUMMARY OF THE ARGUMENT

The district court erred in three respects. First, the trial court erred in ruling that the Division's administrative rule conflicts with the governing statute. The statute expressly requires payment of "costs of counsel" and "reasonable litigation expenses," but does not require separate payment of those expenses. The administrative rule provides separate sets of payments for: (1) expenses for legal services performed and litigation costs incurred; and (2) expenses, up to a total of \$20,000 in any one case, for court approved investigators, expert witnesses, and consultants. The rule is consistent with the statute because it does not abridge, enlarge, or extend the statutory provisions. Rather, it only provides the *procedures* for paying the required statutory expenses. Petitioner agreed to accept the payments made for both legal fees and litigation costs. Because petitioner is not asking for payment of investigators, expert witnesses, or consultants, he is not entitled to any additional payments.

Second, the court failed to afford the Division's application and interpretation of the rule any deference. The Post-Conviction Remedies Act (the "Act") expressly empowers the Division to administer its provisions. Accordingly, the Division's interpretations of the operative provisions of the Act must be rationally based and should be set aside only if they are imposed arbitrarily and capriciously, or are beyond the tolerable limits of reason. It is reasonable and rational for the Division to provide directions for the time and manner of payments to cover the statutorily enumerated

expenses. The statute describes what expenses are to be paid from state funds, while the rule describes the procedure for making payment to cover those expenses. The Division's decision to pay both costs of counsel and litigation costs through a single set of payments is not arbitrary or capricious, and is not beyond the tolerable limits of reason.

Finally, the district court erred in allowing petitioner's legal counsel carte blanche to order any transcript, regardless of its relevancy, and in requiring the Division to pay for irrelevant transcripts. If required to pay for litigation expenses separately and in addition to costs of counsel, the Division should be required to only pay for transcripts that are relevant to and part of the Rule 60(b) appeal.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE RULE CONFLICTS WITH THE STATUTE.

Menzies ("petitioner") has collaterally attacked his conviction of kidnapping and aggravated murder by filing a petition for post-conviction relief. A petition for post-conviction relief is a civil matter. *See* Utah R. Civ. P. 60(b). Defendants pursuing post-conviction appeals are not constitutionally entitled to legal counsel. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Treff v. Hinckley*, 2001 UT 50, 26 P.3d 212. Nonetheless, in post-conviction appeals the Utah Legislature has provided for both the appointment and payment of legal counsel for indigent defendants in capital post-conviction proceedings:

Costs of counsel and other reasonable litigation expenses incurred in providing representation [in post-conviction petitions] shall be paid from

state funds by the Division of Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

Utah Code Ann. § 78-35a-202(2)(c) (West 2004) (the “statute”).

To meet the statute’s mandate, the Division of Finance (the “Division”) promulgated Utah Administrative Code Sections R. 25-14-1 through 6 (the “rule” or “administrative rule”). Absent extraordinary circumstances, the rule provides for two separate sets of payments to cover costs of counsel and litigation expenses. The first set of payments covers “legal services performed *and* litigation costs incurred.” Utah Admin. Code R.25-14-3 (2002) (providing that “all appointed counsel agree to accept as full compensation for the legal services performed and litigation costs incurred, the amounts provided in the Schedule of Payments of Attorneys Fees found in Section R25-14-4”).¹ The second set of payments covers “reasonable litigation expenses not to exceed a total of \$20,000 in any one case for *court approved investigators, expert witnesses, and consultants.*” Utah Admin. Code R. 25-14-5 (2002) (emphasis added).

Although petitioner has received all amounts for which he qualifies, he argues that the rule cannot be read literally to include payment for ordinary litigation expenses within the first set of payments.² He argues instead that ordinary litigation expenses such a copy

¹ The Schedule of Payments provides \$5,000 upon appointment by the district court, \$5,000 upon timely filing of a petition for post-conviction relief, \$10,000 after completion of discovery, \$5,000 for evidentiary hearings, and \$7,500 upon the filing of a brief and remittur.

² Importantly, petitioner does not challenge the rule’s payment amounts and caps in this appeal. Nonetheless, any issue of the rule’s payment caps is not properly before the

and deposition transcript costs should be paid from the second set of payments, even though these costs admittedly are not of investigators, expert witnesses, or consultants. Even though petitioner never argued that the rule conflicts with the statute, the trial court ruled that the rule conflicts with the statute because “it fails to separate ‘costs of counsel’ from ‘other reasonable litigation expenses.’” The court ordered the Division to pay petitioner’s printing, copy, and deposition transcript costs from the second set of payments. This ruling is in error because the rule is entirely consistent with the statute.

- A. The rule’s express language is entirely consistent with the statute’s requirement that costs of counsel and reasonable litigation expenses for indigent defendants convicted of capital crimes be paid from state funds.

It is well-established that “an agency’s rules must be consistent with its governing statutes.” *Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm’n*, 846 P.2d 1304, 1306 (Utah 1997); *see also West Jordan v. Dep’t of Employment Security*, 656 P.2d 411, 412 (Utah 1982); *SF Phosphates Limited Co. v. Auditing Div.*, 972 P.2d 384, 385 (Utah 1998); *Crossroads Plaza Ass’n v. Pratt*, 912 P.2d 1197, 965 (Utah 1996). A rule that is “in conflict with the express provisions of a statute would in effect amend that statute.” *Id.* A rule is invalid only “when [it] nullify[s] or waive[s] the provisions of statutory law.” *Id.*; *see also Draughon v. Department of Financial Institutions*, 1999 UT App 42, 975 P.2d 935 (holding that a rule is inconsistent with a statute only if it abridges,

Court because petitioner has not petitioned to amend the current rule as required by statute. *See* Utah Code Ann. § 63-46a-12.1 (West 2004). Moreover, petitioner has not exhausted his administrative remedies on this issue.

enlarges, extends, or modifies the statute). A rule, therefore, is consistent with the statute and must be applied as written if it does not “‘confer greater rights or disabilities’ than the governing statute.” *Morgan County v. Holnam, Inc.*, 2001 UT 57, ¶ 10; 29 P.3d 629, 631 (quoting *SF Phosphates*, 972 P.2d at 386). A rule carries a presumption of validity when determining whether the rule is consistent with governing statutes. *South Central Utah Tel. Ass’n, Inc. v. Auditing Division*, 951 P.2d 218, 223 (Utah 1997); *Newspaper Agency Corp. v. Department of Workforce Services*, 1999 UT App 222, ¶ 12, 984 P.2d 399, 402.

In interpreting a statute to determine whether a rule is consistent with its provisions, a court first looks to the plain meaning of the words used by the Legislature. *State v. Ostler*, 2001 UT 68, ¶ 7; 31 P.3d 528, 529; *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1020 (Utah 1995) (holding that “when language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction”). Generally, “rules made in the exercise of a power delegated by the statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.” *Crossroads Plaza*, 912 P.2d at 965; *Ostler*, 2001 UT 68, ¶ 7 (ruling that a rule should be read in harmony with the governing statute so that the rule is acceptable); *McKnight v. State Land Board*, 381 P.2d 726, 731 (Utah 1963) (ruling that “[r]ules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound

reason”).

In the analogous case of *Newspaper Agency Corp. v. Department of Workforce Services*, 1999 UT App 222, 984 P.2d 393, the Utah Court of Appeals ruled that the Department of Workforce Service’s administrative rule authorizing appellate filings at various employment centers was consistent with the governing statute. The administrative rule was consistent with the statute because it “describes who must receive the appeal, while the rule describes a procedure for how this may be accomplished.” *Id.* at ¶ 13. The court determined it was reasonable and rational for the Department in its administrative rule to “flesh out direction for the time, place, and manner of filing an appeal.” *Id.* at ¶ 14. The Department’s rule was entirely consistent with the statute, the court concluded, because it “simply effectuate[s], and thus do[es] not contradict, the statutory goal of providing notice of an intent to appeal to the Division of Adjudication.” *Id.* at ¶ 14; *see also SF Phosphates*, 972 P.2d at 386 (concluding that a Tax Commission rule defining the term “mining” was consistent with the governing statute and rejecting the argument that the mining must have one definition for all tax-related purposes and must be defined broadly); *Morgan County v. Holnam*, 2001 UT 57, 29 P.3d 629 (concluding that Tax Commission’s rule defining “new and expanding operations” to include an increase in plant production or capacity consistent with the governing statute).

In contrast, the Utah Court of Appeals in *Fussell v. Department of Commerce*, 815 P.2d 250, 254 (Utah Ct. App. 1991), ruled that the Department’s rule imposing licensing

requirements on psychologists was inconsistent with the governing statute because it “imposes additional requirements for psychologist licensure that are not contained within the plain meaning of the statutory language.” Specifically, “[r]ather than administering the former statutory requirement for psychologists through clarifying regulations, the Division effectively amended it, by creating stricter educational requirements than the statute contemplated.” *Id.*; see also *Airport Hilton Ventures, Ltd. v. Utah State Tax Comm’n*, 1999 UT 26, 976 P.2d 1197 (concluding that the Tax Commission exceeded its power to assess sales and transient room tax as authorized by the governing statute by promulgating a rule that added other criteria to the statute determining taxability).

The rule in this case is entirely consistent with the express language of the statute. Construing the statute and rule in harmony, the statute enumerates *what* expenses are covered, while the rule provides procedures for *how* those expenses are paid. The statute simply requires the payment of “[c]osts of counsel and other reasonable litigation expenses.” Similar to the statute in *Newspaper Agency Corp.*, the statute is silent on the time, manner, and amount of payments to cover costs of counsel and litigation expenses.

The rule therefore provides prescribes the time, manner, and amount of payment. The rule pays for “legal services performed and litigation costs incurred,” from one set of payments, and “reasonable litigation expenses . . . for court approved investigators, expert witnesses, and consultants” from a second, separate set of payments. The rule pays a set amount for legal services performed and litigation costs incurred upon the happening

of certain, objective events, such as \$5,000 upon appointment of counsel, \$5,000 upon proof of timely filing of a petition, and \$10,000 after all discovery is completed. Payment of investigators, expert witnesses, and consultants, on the other hand, is paid upon court approval and is capped at \$20,000. In contrast to *Fussell*, the rule does not impose additional or stricter requirements than the statute. Rather, it simply provides procedures to carry out the statutory mandate. Accordingly, the rule is entirely consistent with the statute.

B. The administrative rule is consistent with the statute even if it contains non-substantive differences in wording.

A rule is not invalid simply because it contains some minor differences in wording from the controlling statute. The Utah Supreme Court has rejected the notion that minor wording differences from a statute invalidate a rule. See *Layton City v. Glines*, 616 P.2d 588 (Utah 1980). In *Glines*, the court rejected an argument that a city ordinance penalizing persons driving while intoxicated contained an invalid inconsistency because the city failed to amend the ordinance consistent with amendments made to the controlling state regulation. 616 P.2d at 588. The ordinance differed from the state regulation only in the absence of any provision dealing with subsequent conviction for driving while intoxicated and the penalties prescribed for injuries inflicted while operating a vehicle in a proscribed manner. *Id.* at 598. Although the court acknowledged differences between the state regulation and ordinance, it concluded that those differences did not amount to an “invalidating inconsistency.” *Id.* The court pointed out that “[i]n

determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *Id.* (quoting *Salt Lake City v. Kusse*, 93 P.2d 671, 673 (Utah 1938)). The ordinance was valid even though it did not encompass all the proscriptions of the state regulation because it did not permit or forbid anything beyond the statute. *Glines*, 616 P.2d at 588; *see also Richfield City v. Walker*, 790 P.2d 87 (Utah Ct. App. 1990) (concluding no invalidating inconsistency between a city DUI ordinance and state statute and ruling that a “municipal ordinance need not be identical to the controlling state statute to be consistent with it”).

The rule in this case uses key terms of art and concepts that are not only synonymous with, but are virtually identical to those used in the statute. The statute requires payment of “costs of counsel” and “reasonable litigation expenses.” The rule provides payment for “legal services performed and litigation costs incurred.” Both the statute and rule, through the first set of payments, provide payment of legal fees and ordinary litigation costs such as the printing, copy, and deposition costs. Just as in *Glines*, the rule and statute are in complete harmony because, even though the language is slightly different, the rule does not permit or forbid payment of any expense not expressly enumerated by the statute. Rather, both the rule and statute provide payment for legal fees and routine litigation expenses. In short, the rule and statute are consistent regardless of minor differences in terminology between the rule and statute.

- C. Not only is the rule consistent with the language of the statute, it is also consistent with the intent of the statute.

In addition to being consistent with the express language of the statute, the rule is also entirely consistent with the intent of the statute. The statute's intent simply is not undercut by the rule's current payment provisions.

The Post-Conviction Remedies Act's (the "Act") intent is to "establish a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies" Utah Code Ann. § 78-35a-102 (West 2004). To help accomplish the Act's intent, the statute provides for the appointment and payment of legal counsel for indigent defendants in capital cases. Rather than direct the manner in which payments are made or the amount of expenses covered, the Legislature expressly directed the Division to promulgate rules to administer payment of the enumerated expenses.

Consistent with the Legislature's direction, the rule's express intent is to "establish the procedures and maximum compensation amounts to be paid for attorneys fees and litigation expenses by the Division of Finance." Utah Admin. Code R. 25-14-1(2) (2002). Accordingly, the rule describes the manner in which payment for expenses will be made and in what amounts; it does not, however, enumerate what expenses will and will not be paid.

The rule also acts in concert with the statute to accomplish several public policy goals. First, the rule places responsible limits on the expenses of individual defendants

while at the same time serving the greater public interest by providing taxpayer funding for post conviction proceedings.

Second, the rule allows for quick, effective, and consistent administration. The rule provides payment of legal fees and ordinary litigation expenses on the happening of specific, objective events. Legal counsel need only provide proof of the event. Only the extraordinary expenses of investigators, expert witnesses, and consultants requires court approval. This payment mechanism allows legal counsel the discretion to most effectively use the funds provided. Legal counsel know, up front, the amounts available, when those amounts will be paid, what expenses will be covered, and what is required for payment.

Finally, the rule effectively removes the Division from any decision-making on the merits of a particular expense. The rule allows assigned legal counsel to make decisions on costs and expenses without the oversight of a government agency. By providing procedures for payment, the rule simply helps carry out the statutory intent, and it is consistent with the statutory goal of providing funds for effective representation of indigent defendants convicted of capital crimes.

II. THE DIVISION'S RULE AND DECISION TO PAY COSTS OF COUNSEL TOGETHER WITH REASONABLE LITIGATION EXPENSES IS REASONABLE AND RATIONAL.

The standard of review applied to an agency's interpretations of the operative provisions of the statutory law it is empowered to administer is an arbitrary and capricious standard. *Associated General Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112,

¶ 17; 38 P.3d 291, 297 (emphasis added); *SF Phosphates Limited Co. v. Auditing Div.*, 972 P.2d 384, 385 (Utah 1998) (ruling that an agency’s interpretation of its own rules are reviewed for reasonableness). Under the arbitrary and capricious standard of review, agency interpretations must be rationally based and are set aside only if they are arbitrary and capricious or beyond the tolerable limits of reason. *Associated. Gen. Contractors*, 2001 UT 112, ¶ 17. An agency’s interpretation of the statutory law it is empowered to administer is

limited to situations where the agency has been granted explicit or implicit discretion under the statute, where the agency possesses expertise concerning the operative provisions at issue, or where the agency is otherwise in a better position than the court to assess the law due to its experience with the relevant subject matter.

Id.

The statute at issue here is the prototypical example of an explicit grant of discretion to an agency. The statute expressly provides that “costs of counsel and reasonable litigation expenses . . . shall be paid from State funds by the Division of Finance according to rules established pursuant to [the] Utah Administrative Rulemaking Act.” Utah Code Ann. § 78-35a-202(2)(c) (West 2004). Not only does the statute explicitly grant the Division the discretion to promulgate rules, the Division possesses the expertise to administer the statute’s payment provisions. Indeed, the Division’s core responsibility and expertise is to control, account for, and pay state funds. The Division not only routinely pays expenses incurred by indigent defendants convicted of capital

crimes, but also from similar funds it administers, such as the Indigent Defense Fund. *See e.g. Associated Gen. Contractors*, 2001 UT 112, ¶ 19 (concluding that it was within the State Board of Oil, Gas, and Mining’s expertise to define terms by rule using geological rather than economic terminology). Because of the statute’s explicit grant of authority, the arbitrary and capricious standard of review is the correct standard to apply in interpreting and applying the rule. *See Id.*

When interpreting an administrative rule, courts use standard rules of statutory construction. *McKnight v. State Land Board*, 381 P.2d 726, 731 (Utah 1963); *Brendle v. City of Draper*, 937 P.2d 1044, 1047 (Utah Ct. App. 1997). “Rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.” *McKnight*, 381 P.2d at 731.

In the analogous case of *Associated General Contractors*, the Utah Supreme Court ruled that an administrative rule promulgated by the Board of Oil, Gas, and Mining that defined terms using geological rather than economic terminology was valid because it was consistent with the controlling statute. 2001 UT 112, ¶ 26. It was rational and reasonable, the court concluded, for the Board to use geological terminology to define key terms because, in part, the governing statute itself used geological terminology to define terms and the administrative rule simply followed the definitional framework established by the governing act itself. *Id.* at ¶ 26. The court also applied an arbitrary and capricious

standard of review because the governing statute expressly allowed the Board to enact rules necessary to carry out the purpose of the governing statute. *Id.* at ¶ 19.

Similarly, in *Newspaper Agency Corp.*, the Utah Court of Appeals ruled that “[i]t was reasonable and rational for the Department [of Workforce Services] to flesh out directions for the time, place, and manner of filing an appeal.” 1999 UT App 222, ¶ 14. Therefore, the rule was entirely consistent with the governing statute because it “prescribed the permitted methods for filing an appeal with the Division” whereas the statute described who must receive the appeal. *Id.*

Associated General Contractors and *Newspaper Agency Corp.* command the same result in this case. The rule could not be more clear: “all appointed counsel agree to accept as full compensation for the *legal services performed and litigation costs incurred* the amounts provided in the Schedule of Payments of Attorneys Fees found in Section R25-14-4.” Utah Admin. Code R. 25-14-3 (2002) (emphasis added). It is not only reasonable and rational for the Division to supply directions that provide the time and manner for paying expenses, it is required by the statute itself. Petitioner’s argument that he is entitled to separate, additional payments to cover ordinary litigation expenses from the funds set aside for expert witnesses, consultants, and investigators simply is not supported by the plain language of the rule.

The Division interprets and applies its rule as providing payment of costs of counsel and ordinary litigation expenses such as printing, copying, and transcript costs

together from the first set of payments. This interpretation and application is reasonable and rational and the rule should be applied as written to petitioner.

Nonetheless, the reasons for the rule's payment structure and mechanism are many, but all provide a reasonable and rational basis for the rule. First, the payment of a set amount to cover both legal fees and litigation expenses allows legal counsel for indigent petitioners to control and direct those funds, rather than burdening both legal counsel and the Division with the need to submit each and every bill of various expenses for payment. Legal counsel is thereby placed in the preferred position of deciding how to best use the allotted funds.

Second, because the Division is not involved in the merits of virtually all post-conviction proceedings, payments of ordinary expenses are triggered upon the happening of objective events. The rule generally does not require any qualitative assessment by the Division of particular expenses, but only requires a signed request for payment verifying the happening of the event.

For extraordinary expenses of investigators, expert witnesses, and consultants that may require some qualitative assessments, the rule requires court approval.³ The rule thereby allows assigned legal counsel to make decisions regarding specific expenses without the oversight of a government agency that has no context of the underlying

³ Payment of ordinary expenses from the funds reserved for investigators, expert witnesses, and consultants, would require court approval, whereas under the correct interpretation of the rule, those ordinary expenses do not.

proceedings. It also eases administration of the statute's payment provisions, and provides consistency and objectivity.⁴ Just as in *Associated General Contractors* and *Newspaper Agency Corp.*, the Division's decision to provide one set of payments to cover both costs of counsel and ordinary litigation expenses is reasonable and rational.⁵

III. THE DIVISION IS NOT REQUIRED TO PAY FOR IRRELEVANT COSTS, INCLUDING COPYING COSTS OF IRRELEVANT TRANSCRIPTS, IF PETITIONER IS ENTITLED TO ADDITIONAL SUMS FOR PRINTING AND OTHER COSTS

In ruling that petitioner is entitled to additional payments for litigation expenses, the district court ruled that it "is not here to step in the shoes of Petitioner's counsel." Thus, the court allowed petitioner to "choose to use [the \$20,000 available for investigators, consultants, and expert witnesses] on post-conviction appeal expenses as she deems necessary to perform her duty as counsel." Under the current rule, however, the payments provided allow legal counsel wide discretion to use the funds allotted and does not require the Division or a court to step into the shoes of legal counsel.

⁴ Petitioner's interpretation, on the other hand, would create redundancy, and would effectively provide an additional, unforeseen avenue for payment of litigation expenses. Under petitioner's interpretation, legal counsel would be entitled to payments for costs of counsel and litigation expenses from the first set of payments, payment for expert witnesses and consultants from the second set of payments, and separate, additional payments for litigation expenses also from the second set of payments.

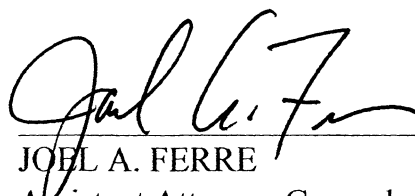
⁵ Had the Division meant that ordinary litigation expenses be paid from the set of funds reserved for investigators, expert witnesses, and consultants, it would have used exemplary language rather than exclusive, limiting language. The rule does not use the nonexclusive terms "for example" or "such as." The rule specifically enumerates payments for investigators, experts witnesses, and consultants only.

Nonetheless, should the Division be required to pay petitioner additional amounts for litigation expenses from the second set of payments, it should only be obligated to pay for those transcripts properly referenced in the rule 60(b) motion proceedings. In any appeal, the record consists of “[t]he original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet.” Utah Rule App. P. 11(a). Petitioner may only appeal the trial court’s denial of rule 60(b) relief. Accordingly, petitioner may only designate the transcripts from the rule 60(b) proceedings for his post-conviction appeal. As this Court has previously ruled in the related post-conviction appeal, if the Division is required to pay additional sums for copies of transcripts, it is only obligated to pay for those transcripts properly referenced in the rule 60(b) motion proceedings. (Appendix “B”). The Division should be under no obligation to pay for transcripts that are irrelevant to the rule 60(b) motion proceedings and that were not properly referenced in those proceedings.

CONCLUSION

For the above reasons, the Court should vacate the trial court’s order and remand for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of December, 2004.



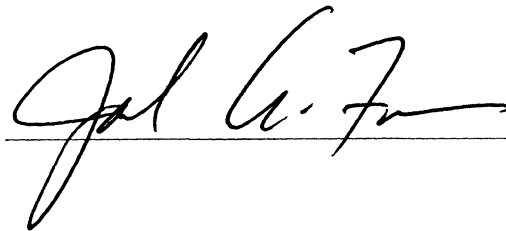
JOEL A. FERRE
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2004, I served two copies of the foregoing Brief on the following:

Liz Hunt
3194 S 1100 E #202
Salt Lake City, Utah 84106-2526

Thomas Brunker
Utah Attorney General's Office
160 E 300 S, 6th Fl
Salt Lake City, Utah 84114



ADDENDUM “A”

78-35a-202. Appointment and payment of counsel in death penalty cases.

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent defendants.

(2) (a) If a defendant requests the court to appoint counsel, the court shall determine whether the defendant is indigent and make findings on the record regarding the defendant's indigency. If the court finds that the defendant is indigent, it shall promptly appoint counsel who is qualified to represent defendants in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure.

(b) A defendant who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(c) Costs of counsel and other reasonable litigation expenses incurred in providing the representation provided for in this section shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

R25-14-1. Authority and Purpose.

(1) This rule is implemented pursuant to Section 78-35a-202.

(2) The purpose of the rule is to establish the procedures and maximum compensation amounts to be paid for attorneys fees and litigation expenses by the Division of Finance to legal counsel appointed by district courts to represent indigent persons sentenced to death who request representation to file an action under Title 78, Chapter 35a, Post-Conviction Remedies Act.

R25-14-2. Request for Payment.

In order to obtain payment for attorney's fees and litigation expenses, counsel appointed by a district court, pursuant to Section 78-35a-202(2)(c), shall present to the Division of Finance a certified copy of the district court order of appointment of legal counsel and a signed Request for Payment verifying the work has been performed as provided in Section R25-14-4 pursuant to the schedule of payments set forth in that section.

R25-14-3. Scope of Services.

(1) All appointed counsel, by accepting the court appointment to represent an indigent client sentenced to death and by presenting a Request for Payment to the Division of Finance, agree to provide all reasonable and necessary post-conviction legal services for the client, including timely filing an action under the provisions of Title 78, Chapter 35a, Post-Conviction Remedies Act and representing the client in all legal proceedings conducted thereafter including, if requested by the client, an appeal to the Utah Supreme Court.

(2) All appointed counsel agree to accept as full compensation for the legal services performed and litigation costs incurred the amounts provided in the Schedule of Payments of Attorneys Fees found in Section R25-14-4.

R25-14-4. Schedule of Payments of Attorneys Fees.

All counsel appointed to jointly represent a single client shall be paid, in the aggregate, according to the following schedule of payments upon certification to the Division of Finance that the specified legal service was performed or the specified events have occurred:

(1) \$5,000.00 upon appointment by the district court and presentation of a signed Request for Payment to the Division of Finance.

(2) \$5,000.00 upon timely filing a petition for post-conviction relief.

(3) \$10,000.00 after all discovery has been completed, all prehearing motions have been ruled upon, and a date for an evidentiary hearing has been set.

(4) If an evidentiary hearing is required, \$5,000.00 on the date the first witness is sworn.

(5) \$7,500.00 if an appeal is filed from a final order of the district court. \$5,000.00 of the total shall be paid when the brief on behalf of the indigent person is filed and \$2,500.00 when the Utah Supreme Court finally remits the case to the district court.

(6) An additional fee of \$100 per hour, but in no event to exceed \$5,000.00 in the aggregate, shall be paid if:

(a) counsel satisfy the requirements of Rule 4-505, Utah Code of Judicial Administration;

and

(b) the district court finds:

(I) that the appointed counsel provided extraordinary legal services that were not reasonably foreseeable at the time of accepting the appointment, such as responding to or filing a petition for interlocutory appeal, and

(ii) the services were both reasonable and necessary for the presentation of the client's claims.

(c) These additional fees shall be paid upon approval by the district court and compliance with the provisions of this rule.

R25-14-5. Payment of Reasonable Litigation Expenses.

The Division of Finance shall pay reasonable litigation expenses not to exceed a total of \$20,000.00 in any one case for court approved investigators, expert witnesses, and consultants. Before payment is made for litigation expenses, the appointed counsel must submit a request for payment to the Division of Finance including:

(1) a detailed invoice of all expenses for which payment is requested; and

(2) written approval of the district court certifying that the expenses were both reasonable and necessary for the presentation of the client's claims.

R25-14-6. Withdrawal of Counsel.

(1) If an attorney appointed under Section 78-35a-202 is permitted to withdraw by the court or, due to death or disability, is unable to continue, the attorney shall be paid only for the actual work performed to the date of withdrawal as certified by the court.

(2) If withdrawal is ordered by the court because of counsel's improper conduct or the court finds that a foreseeable conflict of interest which should have been disclosed prior to appointment existed, all compensation received by the attorney shall be repaid to the Division of Finance.

ADDENDUM “B”

FILED
UTAH APPELLATE COURTS

JUN 30 2004

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
WEST VALLEY DEPT

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JUL - 7 2004

CLERK OF THE DISTRICT COURT
Time _____

Ralph Leroy Menzies,

Appellant,

v.

Case No. 20040289-SC

Hank Galetka, Utah State
Prison Warden,

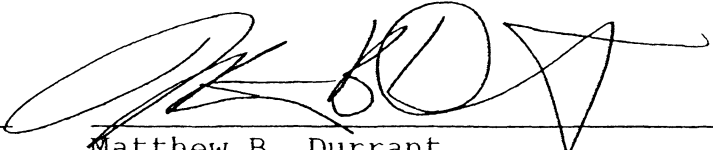
Appellee.

ORDER

Before the Court is Appellee's motion to strike Appellant's designation of record. The motion is denied in part and granted in part. The State shall be required to provide a transcript for each hearing described by affidavit to be submitted by Appellant's counsel to the district court. The affidavit shall specify the manner in which each hearing was referenced during the rule 60(b) proceedings and its relevance to those proceedings. For purposes of plenary review of the denial of the rule 60(b) motion, this court will only consider those record materials properly referenced in the rule 60(b) motion proceedings. In the event this Court finds that a transcript was not referenced during the rule 60(b) proceedings, but Appellant's counsel nevertheless required its production pursuant to affidavit, Appellant shall be required to reimburse the State for the costs of procuring the transcript. Appellant's motion for costs and attorney fees is denied.

FOR THE COURT:

6-30-04
Date


Matthew B. Durrant
Justice

CERTIFICATE OF MAILING

I hereby certify that on June 30, 2004, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

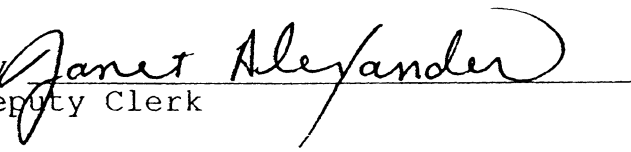
ELIZABETH HUNT
ATTORNEY AT LAW
1018 E MILLBERT AVE
SALT LAKE CITY UT 84106

ERIN RILEY
THOMAS BRUNKER
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, WEST VALLEY
ATTN: KAREN EELLS
3636 CONSTITUTION BLVD
WEST VALLEY CITY UT 84119

Dated this June 30, 2004.

By 
Deputy Clerk

Case No. 20040289
THIRD DISTRICT, WEST VALLEY, 030106629

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST VALLEY DEPARTMENT

RALPH LEROY MENZIES,

RULING AND ORDER

Petitioner,

vs

Case No 030106629

HANK GALETKA, Utah State Prison

Judge PAT B BRIAN

Respondent

The above post conviction case comes before the Court for decision on Ralph Leroy Menzies' ("Petitioner" or "Appellant") Petitioner's motion to strike the Division of Finance ("the Division") response and objection to Petitioner's request for transcripts and designation of record and the Division's opposition to Petitioner's motion to strike

BACKGROUND

On April 21, 2004, the Court granted Petitioner's motion for the Division to pay for transcripts, printing and other costs of appeal, as deemed necessary by Petitioner's counsel. On April 26, 2004, the Division filed an appeal challenging the Court's decision. On May 4, 2004, Petitioner filed a notice of cross-appeal. On May 11, 2004, Petitioner filed his request for transcripts and designation of record. On May 18, 2004, the Division filed its response and objection to Petitioner's request. On May 20, 2004, Petitioner filed her opposition and motion to strike. On May 28, 2004, the Division filed its opposition to Petitioner's motion to strike. The parties did not request oral argument.

On June 30, 2004 the Utah Supreme Court issued an Order granting in part and denying in part the State of Utah's motion to strike Petitioner's designation of record. The Court stated in relevant part

The State shall be required to provide a transcript for each hearing described by affidavit to be submitted by Appellant's counsel to the district court. The affidavit shall specify the manner in which each hearing was referenced during the rule 60(b) proceedings and its relevance to those proceedings. For purposes of plenary review of the denial of the rule 60(b) motion, this court will only consider those record materials properly referenced in the rule 60(b) motion proceedings. In the event this Court finds that a transcript was not referenced during the rule 60(b) proceedings, but Appellant's counsel nevertheless required its production pursuant affidavit, Appellant shall be required to reimburse the State for the costs of procuring the transcript.

ANALYSIS

Based upon the Utah Supreme Court's order and the Division's memoranda, along with other documents in this case, it appears that Petitioner's motion to require the Division to pay for all thirty-three (33) transcripts, given the narrow issue on appeal may be excessive. However, in a Rule 60(b) motion the final step in the analysis is whether there is a meritorious claim. Here, the motion for summary judgment that Petitioner tried to set aside by his Rule 60(b) motion, relates to one claim, whether there was ineffective assistance of counsel at Petitioner's trial and direct appeals. If the final prong of the Rule 60(b) motion is addressed by the Utah Supreme Court, then the thirty-three (33) transcripts may be relevant to the issue of whether Petitioner's remaining claim has merit. Nevertheless, as stated by this Court before, "The Court is not here to step in the shoes of Petitioner's counsel." The Utah Supreme Court has ordered Petitioner's counsel to file an affidavit specifying what hearings were referenced in the Rule 60(b)

proceedings and the relevance of those hearings in the Rule 60(b) proceedings and Petitioner's counsel may request transcripts accordingly

Based upon the discussion above, the Court DENIES Petitioner's motion to strike.

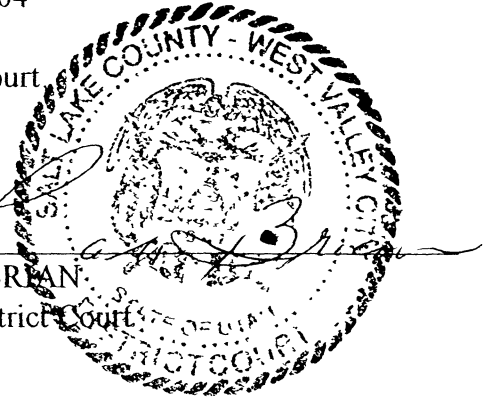
ORDER

The Court ORDERS Petitioner's counsel to file an affidavit as detailed and ordered by the Utah Supreme Court and an amended request for transcripts and designation of record .

DATED this 8 day of July, 2004

By the Court

PAT B BRIAN
Third District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030106629 by the method and on the date specified.

METHOD	NAME
Mail	THOMAS B BRUNKER ATTORNEY RES 160 EAST 300 SOUTH #600 P.O. BOX 140854 SALT LAKE CITY, UT 84114-0000
Mail	JOEL A FERRE ATTORNEY RES 160 EAST 300 SOUTH, 5TH FLOOR P.O. BOX 140857 SALT LAKE CITY UT 84114-0857
Mail	ELIZABETH HUNT ATTORNEY PET 3194 S 1100 E STE 202 SALT LAKE CITY UT 84106

Dated this 8th day of July, 2004.

Marianne L. Call
Deputy Court Clerk

ADDENDUM “C”

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST VALLEY DEPARTMENT

RALPH LEROY MENZIES,

MEMORANDUM DECISION

Petitioner,

vs

Case No 030106629

HANK GALETKA, Utah State Prison

Judge PAT B BRIAN

Respondent

The above post conviction case came before the Court for hearing on Ralph Leroy Menzies' (Petitioner) (1) motion to appoint Rule 8 qualified counsel for appeal, (2) motion to order payment of Brass deposition transcript bill, (3) motion to require government to pay for transcripts, printing and costs for appeal and (4) cross motions to extend time for filing notice of appeal

At the hearing, the Court granted the parties cross motions to extend time for filing notice of appeal and the Court took the remaining three motions under advisement. The Court considered the parties oral arguments and reviewed the parties briefs, applicable constitutional, statutory, case law and rules and now renders the following decision on the remaining three motions

BACKGROUND

This case has a long protracted history, which the Court does not provide here. Following is a very brief history of the case. On March 8, 1988, Petitioner was found guilty of first degree murder, a capital offense, and aggravated kidnapping, a first degree felony, in the

003904

death of Maurine Hunsaker. Petitioner directly appealed the merits of his conviction. The Utah Supreme Court affirmed Petitioner's conviction.

On April 20, 1995, Petitioner filed a Petition for Writ of Habeas Corpus and/or Post Conviction Relief. On December 7, 2002, the Court granted Respondent's motion for summary judgment on Petitioner's petition. On January 11, 2002, the Court dismissed Petitioner's petition for post conviction relief.

Petitioner filed a motion to set aside the summary judgment. On February 26, 2004, the Court denied Petitioner's motion to set aside.

I

MOTION TO APPOINT RULE 8 QUALIFIED COUNSEL FOR APPEAL

Petitioner now seeks to have Rule 8 qualified counsel appointed for appeal relating to his post conviction petition. Petitioner argues that he has a right to appeal this Court's denial of the motion to set aside summary judgment. *Citing* Utah Constitution, Article 1 §11 and 12, Article 8 § 5, Utah Code §§ 77-1-6(1)(g), 77-18a-1(b), and 78-35a-110, Utah R. Civ. P. 65C(o) and 60(b). Petitioner claims that the Utah Code contemplates that Rule 8 qualified counsel will be appointed to represent indigent capital defendants in post-conviction cases, and will be paid by the Division of Finance. *Citing* Utah Code § 78-35a-202, Utah R. Crim. P. 8. Furthermore, Petitioner argues that the Utah Administrative Code governing capital post-conviction cases contemplates that post-conviction counsel will continue to provide "all reasonable and necessary post-conviction legal service" and will be paid to complete an appeal to the Utah Supreme Court. *Citing* Utah Adm. Code §§ 25-14-3(1), *see also* 25-14-2, 25-14-4(5). Petitioner claims that the Court's failure to appoint counsel to pursue his right to appeal would violate his due process rights.

Petitioner argues that given the complexity of capital post-conviction litigation, it would be unfair to expect Petitioner, an indigent death row inmate with no law library, to represent himself. Petitioner argues that it is in society's best interest to appoint counsel because of the unique and unalterable nature of the death penalty. Moreover, Petitioner argues that there is no substantial prejudice or injustice that will befall the Respondent by granting Petitioner a fair opportunity to exercise his rights through counsel on appeal.

It is well established that a criminal defendant is entitled to counsel for his trial and in Utah, pursuant to statute for direct appeals of his conviction of certain crimes. *See* Utah Code § 77-32-301 *et seq*, *but see Douglas v. California*, 372 U.S. 353 (1963). However, that is not the case before the Court. Here, Petitioner launched a collateral attack of his conviction by filing his post conviction petition, a civil matter.

The issue, therefore, is whether Petitioner is entitled to appointment of Rule 8 qualified counsel for his post conviction appeal.

Upon review of federal and state law, the Court concludes that a constitutional right to counsel does not extend to a post conviction petition appeal, which is a civil matter. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) *citing Johnson v. Avery*, 393 U.S. 483 (1969), *Wainwright v. Torna*, 455 U.S. 586 (1982), *Ross v. Moffitt*, 417 U.S. 600 (1974), *see also Treff v. Hinckley*, 26 P.3d 212 (Utah 2001), *Walker v. Carlson*, 740 P.2d 1372 (Utah App. Ct. 1987).

Although there is no constitutional right to counsel for post conviction petition appeal, the Utah state legislature has enacted the Post-Conviction Remedies Act, Utah Code §§ 78-35a-101 *et seq* (the Act) providing appointment of counsel for post conviction proceedings.

Here, the State does not oppose Petitioner's motion for appointment of counsel based

upon law of the case. This Court previously appointed Petitioner's counsel and found her to be Rule 8 qualified to represent persons sentenced to death in post-conviction cases. The Court also previously and still finds Petitioner to be indigent.

Accordingly, the Court GRANTS Petitioner's motion to appoint Rule 8 qualified counsel for appeal.

II
MOTION TO ORDER PAYMENT
OF BRASS DEPOSITION TRANSCRIPT BILL and
MOTION TO REQUIRE GOVERNMENT TO PAY
FOR TRANSCRIPTS, PRINTING AND COSTS

The two remaining motions raise the same issue of whether Petitioner is entitled to payment of transcripts, printing and other costs associated with his post conviction appeal.

Petitioner claims that he is entitled to payment of transcripts, printing and other costs associated with his post conviction appeal pursuant to the Act, § 78-35a-202; Rule 8; Utah Code §§ 25-14-2; 25-14-4(5). Petitioner argues that for his counsel to be effective she must present his case using the record, which includes transcripts and other costs. Since Petitioner is indigent, he cannot bear this expense and counsel should not have to either. Petitioner argues that the legislature has provided that the Division of Finance should pay for these expenses.

The Division of Finance (the Division) filed a response to Petitioner's motions. The Division argues that although the Division is the entity charged by statute to pay the costs of counsel for indigent defendants pursuing post conviction remedies pursuant to the Act, the Division has already provided Petitioner the payments to which he is entitled. Utah Administrative Procedures Act R25-14-3 provides that "[a]ll appointed counsel agree to accept as full compensation for the legal services performed and litigation costs incurred the amounts

provided in the Schedule of Payments of Attorneys Fees found in Section R25-14-4 " (The schedule) The Division argues that the only additional payments provided by the Rule are for "reasonable litigation expenses not to exceed a total of \$20,000 in any one case for court approved investigators, expert witnesses, and consultants " Utah Adm R 25-14-5 The Division argues that it interprets its rule as plainly written that payment made under the schedule is to cover the legal service performed and litigation costs incurred The Division argues that the Petitioner has received all payments under the schedule for which he has qualified and these payments are to cover reasonable litigation expenses, *e g* , transcripts, printing, filing fees etc

Section 78-35a-202 provides

(2)(a) If a defendant requests the court to appoint counsel, the court shall determine whether the defendant is indigent and make findings on the record regarding the defendant's indigency If the court finds that the defendant is indigent, it shall promptly appoint counsel who is qualified to represent defendants in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure (c) Costs of counsel and other reasonable litigation expenses incurred in providing the representation provided for in this section shall be paid from state funds by the Division of Finance

The statute specifically provides that "costs of counsel and other reasonable litigation expenses shall be paid from state funds by the Division of Finance " The Division's rules are a promulgation of the statute The rule fails to separate "costs of counsel" from "other reasonable litigation expenses " The rule is too narrowly written to represent the statute The statute separates expenses for "costs of counsel" from "other reasonable litigation expenses" and so does the Court Post conviction attorney's are already rare and the attorney's fees are not enough to cover expenses for transcripts, printing and other costs associated with post conviction appeals Post conviction appeals clearly requires transcripts, printing and other expenses,

therefore, there is no dispute that those are "reasonable expenses" incurred in providing Petitioner's representation. However, from oral arguments, it is apparent that there is dispute regarding how many transcripts are necessary to perform Petitioner's post conviction appeal. The Court is not here to step in the shoes of Petitioner's counsel. Petitioner's counsel knows the limited amount available for post conviction litigation under the Division's rules, therefore, she may choose to use that money on post conviction appeal expenses as she deems necessary to perform her duty as counsel.

Accordingly, the Court GRANTS Petitioner's motion to order payment of Brass deposition transcript bill and motion to require government to pay for transcripts, printing and costs for appeal

ORDER

The Court ORDERS:

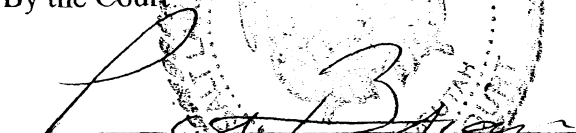
Petitioner to submit an Order for Appointment of Counsel;

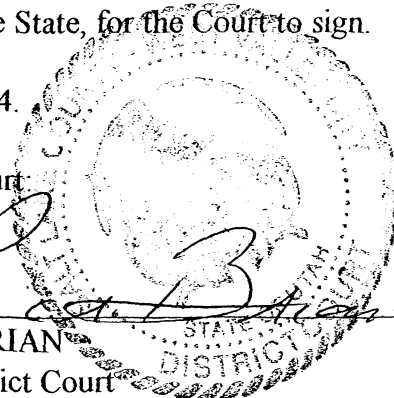
Petitioner to submit an Order to Pay for Transcripts, Printing and Costs.

The above Orders should be filed, after stipulation by the State, for the Court to sign.

DATED this 21 day of April, 2004.

By the Court


PAT B. BRIAN
Third District Court



ELIZABETH HUNT (#5292)
Attorney for Mr Menzies
P O Box 9419
SALT LAKE CITY, UTAH 84109-0419
Telephone (801)706-1114

FILED
3RD DISTRICT
2004 MAY -5 AM 11:17
EST. FILE - DISTRICT
BY _____

IN THE THIRD DISTRICT COURT, WEST VALLEY DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RALPH LEROY MENZIES, Petitioner, v. HANK GALETKA, Utah State Prison Warden Respondent.	ORDERS TO APPOINT COUNSEL AND FOR STATE TO PAY FOR TRANSCRIPTS AND COSTS OF APPEAL Case No 030106629 JUDGE BRIAN
--	--

Whereas, this matter came on for hearing before this Court on March 25, 2004, upon the Petitioner's motion to appoint Rule 8 qualified counsel for the appeal from this Court's February 26, 2004 order denying relief from the summary judgment, and upon Petitioner's motions to require the State to pay for the transcript of the January 13, 2004, deposition of Edward K. Brass and for the transcripts, printing and other costs on appeal

The Court has fully considered the motions and memoranda and arguments of the parties.

Based upon the Motions of Petitioner, and good cause appearing,

IT IS HEREBY ORDERED.

1 Elizabeth Hunt is found to be Rule 8 qualified to represent Menzies in his appeal from this Court's February 26, 2004 order denying relief from summary judgment, and is hereby appointed to complete the appeal.

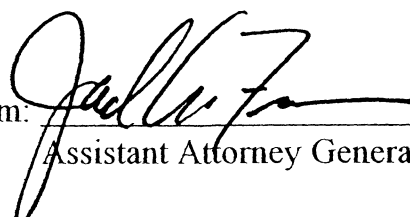
2. The State of Utah, Division of Finance, is hereby ordered to pay the CitiCourt bill for the January 24, 2004, deposition of Edward K. Brass.

3. The State of Utah, Division of Finance, is hereby ordered to pay for transcripts, printing and other costs of appeal, as deemed necessary by counsel for petitioner

Dated this 10 day of May, 2004


THE HONORABLE PATTI BRIAN
JUDGE OF THE THIRD DISTRICT COURT

Approved as to form:


Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was e-mailed and mailed to:

Joel Ferre
Heber Wells Building
160 East 300 South
Box 140857
Salt Lake UT 84114-0857

and to:

Ralph Menzies

Utah State Prison
P.O. Box 250
Draper, Utah 84020

this April 23, 2004
